UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

November 30, 1998

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 98B00051
AGRIPAC, INC., Respondent.	)	

ORDER

INTRODUCTION

This is an action filed by the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) in which OSC alleged that Agripac, Inc. violated the Immigration and Nationality Act as amended, 8 U.S.C. § 1324b, by engaging in a pattern or practice of discriminatory acts in the hiring of employees. Discovery is in progress. On November 2, 1998 OSC and Agripac filed a stipulated protective order setting forth their agreed undertakings governing the confidential treatment and non-disclosure of documents and information exchanged inter se for the purposes of settlement discussions. The stipulations they set forth will be approved with qualifications.

Paragraphs 1 and 2 of the agreement initially call for the confidential labeling and treatment of documents and information by "Complainant, his attorneys, persons assisting his attorneys, and by anyone else to whom any such documents and any such information is disclosed," but paragraph 2 also provides that "in no event shall they be disclosed to any person who is not an employee of the Office of Special Counsel." Paragraph 4 governs the return of documents upon termination of the settlement discussions, while paragraph 3 reads as follows:

> In the event that either party uses these documents or any information contained in these documents in connection with any settlement agreement, such documents and information will not be made part of the public record, and will be treated and maintained by the parties AND THE COURT as under seal and not open to public inspection.

First, this stipulation obscures OSC's dual role in this proceeding, both as a party in its own right and as a representative of other persons yet to be named, as well as of the third party, Agustin Lua Talavera. To the extent that the language restricting access to information to employees of OSC can be read to preclude access to otherwise discoverable information by Talavera or by

other persons potentially affected by Agripac's hiring practices but as yet unnamed, it is specifically disapproved.

Second, to the extent OSC and Agripac seek by their stipulations to bind this office in advance to a blanket sight-unseen exclusion of prospective filings in this forum from the public record, or to obtain any advance commitment on my part that unidentified documents to be filed in this forum in the future will be automatically placed under seal, that implication is unequivocally rejected. The voluntary stipulations of OSC and Agripac regarding information disclosed to each other for purposes of settlement discussions will be honored; the implication, however, that documents to be filed in this forum in the future may so readily be withheld from the public record, from other persons potentially affected by Agripac's hiring practices or from Talavera is another matter altogether.

The public has an interest in access to records showing the conduct of the public business by a government agency. While the desire to maintain confidentiality of settlement negotiations is generally entitled to some deference, Wayne D. Brazil, Protecting the Confidentiality of Settlement Negotiations, 39 Hastings L.J. 955 (1988), a party seeking secrecy for documents submitted to support a final disposition of a case bears a heavier burden of justification. See Brian T. Fitzgerald, Note, Sealed v. Sealed: A Public Court System Going Secretly Private, 6 J.L. & Pol. 381 (1990). Any interest in preserving secrecy as to documents and information filed with a public agency is further attenuated where the controversy is not a commercial dispute between two private parties, but a pattern and practice law enforcement action initiated by a governmental agency charged with the responsibility for pursuing important public policies such as non-discrimination.

DISCUSSION

The exercise of judicial discretion with respect to protective orders affecting filings of record necessarily takes place in the context of the strong presumption in favor of public access to judicial proceedings, Nixon v. Warner Communications, Inc. 435 U.S. 589, 602 (1978),[1] and is further constrained by the express provision in OCAHO Rules[2] that protective orders are issued only upon a showing of good cause. 28 C.F.R. § 68.18(c). The right of access to judicial records in this forum is thus not readily susceptible to foreclosure even were the agreement expressly made by all of the parties. While OCAHO's procedural rules provide administrative law judges

[1] See generally Arthur R. Miller, Confidentiality, Protective Orders and Public Access to the Courts, 105 Harv. L. Rev. 427, 492 (1991), Ronald D. May, Public Access to Civil Court Record: A Common Law Approach, 39 Vand. L. Rev. 1465 (1986), William Ollie Key, Jr., Note, The Common Law Right to Inspect and Copy Judicial Records: In Camera or On Camera, 16 Ga. L. Rev. 659 (1982).

[2] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1998).

with broad authority to issue such protective orders as justice may require, 28 C.F.R. §§ 68.18(c) and 68.42, the breadth of that authority should not be read to imply that broad protective orders are routinely issued at the request of a party, even where the parties agree, particularly where, as here, the rights of unnamed persons may be implicated.

The OCAHO rule regarding the issuance of protective orders is similar to, and based upon, Rule 26(c) of the Federal Rules of Civil Procedure, and it is therefore appropriate to look for guidance to cases decided by the federal district courts pursuant to that rule. United States v. Clark, 5 OCAHO 771, at 389 (1995).[3] The Ninth Circuit, in which this case arises, has expressly recognized the common law right of access to judicial records. United States ex rel. McCoy v. California Med. Review, Inc., 133 F.R.D. 143, 148 (N.D. Cal. 1990), citing EEOC v. Erection Co., Inc., 900 F.2d 168 (9th Cir. 1990) and Valley Broad. Co. v. United States Dist. Court, 798 F.2d 1289, 1292 (9th Cir. 1986). California Med. Review specifically applied that common law right to documents related to a settlement hearing. 133 F.R.D. at 149.

The Ninth Circuit in Valley Broad. Co. adopted the Seventh Circuit's approach for determining whether the common law right of access should be overridden, requiring courts to start with a strong presumption in favor of access. Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995). The presumption may be overcome only "on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture." Valley Broad. Co., 789 F.2d at 1293 (quoting United States v. Edwards, 672 F.2d 1289, 1294 (7th Cir.1982)). The Circuit thus reversed an order to seal court documents where the district court failed to articulate any reasoning or findings underlying its decision to seal the decree. Erection Co., 900 F.2d at 169.

In order to justify the issuance of a protective order, there must first be a factual showing of a particular and specific need. Gray v. First Winthrop Corp., 133 F.R.D. 39, 40 (N.D. Cal. 1990). See also Lardy v. United Airlines, Inc., 3 OCAHO 450, at 574 (1992). The showing must be sufficient to overcome the presumption in favor of public access to documents of record, In re Continental Ill. Sec. Litig., 732 F. 2d 1302, 1308-10 (7th Cir. 1984), and the basis of the ruling must be sufficiently stated "to permit appellate review of whether relevant factors were

[3] Citations to OCAHO precedents reprinted in the bound Volumes 1 and 2, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States, and Volumes 3 through 7, Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Laws of the United States, reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1-7 are to the specific pages, seriatim, of the entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 7, however, are to pages within the original issuances.

considered and given appropriate weight." Valley Broad. Co., 798 F.2d at 1294 (quoting Edwards, 672 F.2d at 1294).[4]

The good cause standard puts the burden on the requesting party or parties to show some plainly adequate reason for the issuance of a protective order, and courts have required a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements. Hawley v. Hall, 131 F.R.D. 578, 584 (D. Nev. 1990). Cf. United States v. City of Torrance, 163 F.R.D. 590, 594 (C.D. Cal. 1995) (good cause requires showing with particularity or specificity). In determining whether a party's interest in confidentiality outweighs the strong presumption in favor of public access to judicial proceedings, the Ninth Circuit has stressed the "public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets." Erection Co., Inc., 900 F.2d at 170 (citing Valley Broad. Co., 798 F.2d at 1294). This determination requires specific identification of the nature of the information to be protected. After all the relevant factors are taken into consideration, the decision must finally be based on a compelling reason, and must articulate the factual basis for the ruling, without relying on hypothesis or conjecture. Valley Broad. Co., 798 F.2d at 1295. Thus even where a showing of good cause is made, the court must still engage in a balancing of the interest of the parties with the public interest in preserving the public nature of public proceedings. Welch v. City and County of San Francisco, No. C-93-3722, 1994 WL 387866, at *3 (N.D. Cal. 1994), citing inter alia Wood v. McEwen, 644 F.2d 797, 801-802 (9th Cir. 1981), cert. denied, 455 U.S. 942 (1982).

No cause, good or otherwise, has been shown here for excluding unspecified information or unidentified documents to be filed in the future from the record, nor has there been any identification of the nature either of any specific material sought to be protected or the specific harm to be anticipated if it is not. Protective orders may be designed to protect any one of a variety of interests, such as trade secrets or other proprietary information, personal privacy, national security, internal financial information, state secrets, or other classified or sensitive matter, depending upon the facts and circumstances of the particular case. See generally, 8 Charles Alan Wright, et al., Federal Practice and Procedure § 2043, at 554-572 (2d ed. 1994) and 28 C.F.R. § 68.42(a) and (b). No such interest has been articulated here. I note further that the broad conclusory language referring to "any information contained in these documents" could easily be read to apply to such information as Agripac's address, the name of its attorney, or

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[4] As the Sixth Circuit observed, the concept of public access to judicial proceedings arose in part as a reaction to secret proceedings in the Star Chamber. Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1177 n.6 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984), citing In Re Oliver, 333 U.S. 257, 268-70 (1948). See also Gannett Co. Inc. v. DePasquale, 443 U.S. 368, 387 n.15 (1979) (historically both civil and criminal proceedings open to the public). A prior restraint of the character proposed here thus constitutes "one of the most extraordinary remedies known to our jurisprudence", Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976), and ought not lightly to be entered.

other general information which is readily available elsewhere. Such matters are not the proper subject of a protective order at all. See generally, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37 (1984) (protective order must not restrict dissemination of information gained from other sources). If OSC and Agripac have a clear and specific need for the protection of specific information in this case, it is not apparent from their stipulation.

As Judge Pratt observed, concurring in City of Hartford v. Chase:

> Our courts do not operate in secrecy. Except on rare occasions and for compelling reasons, everything that courts do is subject to direct public scrutiny. To hide from the public eye entire proceedings, or even particular documents or testimony forming a basis for judicial action that may directly and significantly affect public interests, would be contrary to the premises underlying a free, democratic society.

942 F.2d 130, 137 (2d Cir. 1991) (Pratt, J., concurring).

CONCLUSION

Agripac and OSC are accordingly cautioned that should they achieve a settlement, it is their own responsibility either to ensure that no confidential material is contained in any written submission filed in this forum or, in the alternative, to seek at that time a more particularized protective order based upon appropriate specifics.

SO ORDERED.

Dated and entered this 30th day of November, 1998.

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Ellen K. Thomas
Administrative Law Judge